Supreme Court, U.S.
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No. 02 427

IN THE

Supreme Court of the United States

ALEC S. COSTERUS,

Petitioner

v.

JANE SWIFT, ET AL.,

Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Alec S. Costerus, *PRO SE*
1537 Sudbury Road
Concord, Massachusetts 01742
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16 pp

Questions Presented for Review

1. WHETHER the Second Amendment to the U.S. Constitution guarantees an individual right to keep and bear arms?

2. WHETHER the Second Amendment is made applicable to the several States through the Fourteenth Amendment?

3. WHETHER Massachusetts' statute, M.G.L. c. 140, § 131 (d), which provides for standardless discretion to local Licensing Authorities when reviewing an application for a License to Carry Firearms, violates the Equal Protection Clause of the Fourteenth Amendment?

4. WHETHER the local Licensing Authority's after-the-fact consideration of acts which when done were innocent, as ground for denial of a license to carry firearms, violates the Due Process provisions of the Fourteenth Amendment?

Parties to the Proceeding

Petitioner Alec S. Costerus (hereinafter "Costerus") resides at 1537 Sudbury Road in Concord, Massachusetts 01742-5826. Costerus has been an accomplished competitive marksman for many years.

Respondent Jane Swift (hereinafter "Respondent Swift") is the Acting Governor of the Commonwealth of Massachusetts, whose principal place of business is at the State House located at 24 Beacon Street, Boston, Massachusetts 02133. Respondent Swift became Acting Governor on April 10, 2001, who is sued in her official capacity as such.

Respondent Commonwealth of Massachusetts is a state of the United States of America.

Respondents Swift and Commonwealth of Massachusetts are collectively hereinafter referred to as "Respondent State Officials."

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Wetherbee v. Costerus,
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Opinions Below

The appeals court judgment whose review is sought is reproduced in the Appendix B. The district court judgment and its Memorandum and Order are reproduced in Appendix A.

Jurisdictional Statement

Jurisdiction is proper in this Court as follows:

United States District Court's Jurisdiction

1. This action was brought in the United States District Court which has original jurisdiction of all civil actions arising under the Constitution or laws of the United States pursuant to 28 U.S.C. § 1331.

2. This action was brought in the United States District Court which has original jurisdiction of any civil action pursuant to 28 U.S.C. § 1343 (a)(1) for conspiring to interfere with and deprive the civil rights as described in 42 U.S.C. § 1985 (3).

3. This action was brought in the United States District Court which has original jurisdiction of any civil action pursuant to 28 U.S.C. § 1343 (a)(3) for redress of the deprivation, under color of State law or statute, of rights, privileges, or immunities secured by the Constitution of the United States.

4. This action was brought in the United States District Court which has jurisdiction over this matter pursuant to 42 U.S.C. § 1983 for deprivation of rights, privileges, and immunities secured by the Second, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. Plaintiff asserts that several Defendants deprived Plaintiff of said rights, privileges, and immunities.

5. This action was brought in the United States District Court which has jurisdiction over this matter pursuant to 5 U.S.C. § 552a (hereinafter the "Privacy Act of 1974") to enforce any liability created under 5 U.S.C. § 552a (e)(3) for deprivation of rights, privileges, and immunities secured by the Privacy Act of 1974. Plaintiff asserts that several Defendants deprived Plaintiff of said rights, privileges, and immunities.

United States Court of Appeals' Jurisdiction

1. The United States Court of Appeals has jurisdiction of appeals from all final decisions of the district courts of the United States pursuant to 28 U.S.C. § 1291.

2. The United States Court of Appeals for the First Circuit has jurisdiction of appeals from all final decisions of the United States District Court for the District of Massachusetts.

United States Supreme Court's Jurisdiction

The Supreme Court has jurisdiction to review cases in the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254 and Rule 10(a) and (c).

Filing Dates Establishing Timeliness of Appeal

The judgment sought to be reviewed was entered by the U.S. District Court for the District of Massachusetts, Civil Action No. 00-CV-12156-MEL, on March 9, 2001. Petitioner timely filed his Notice of Appeal on March 24, 2001.

The U.S. Court of Appeals for the First Circuit, Case No. 01-1493, based on the papers submitted without oral argument, affirmed the district court's judgment with a judgment entered on March 29, 2002.

The present Petition for Writ of Certiorari to this Court is filed within ninety (90) days and is timely pursuant to 28 U.S.C. 2101(c) and Rule 13(1) and (3).

Appeal of Final Order or Judgment

Petitioner appealed to the U.S. Court of Appeals from the District Court's Memorandum and Order of March 9, 2001 and Judgment of August 8, 2001.

Petitioner seeks writ of certiorari from the Court of Appeals' Judgment dated March 29, 2002.

Petitioner states the State has been and continues to be a defendant - respondent hereto as the Petitioner questions the constitutionality of a statute of a State, and further states that service has been made upon the State's Attorney General pursuant to 28 U.S.C. § 2403(b) and Rule 29(4)(c).

Constitutional Provisions and Statutes Involved

The Second Amendment to the United States Constitution states:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Fifth Amendment to the United States Constitution states, in pertinent part, that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution states, in pertinent part, that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts General Laws, Chapter 140, § 131(d) in pertinent part provides:

> Any person residing or having a place of business within the jurisdiction of the licensing authority . . . may submit to such

> licensing authority . . . an application for a Class A or Class B license to carry firearms, or renewal of the same, which such licensing authority or said colonel **may issue** if it appears that the applicant is a suitable person to be issued such license . . . subject to such restrictions expressed or authorized under this section, unless the applicant . . . [emphasis added].

The full text of M.G.L. ch. 140, § 131 is included in Appendix C.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Alec S. Costerus, respectfully prays that a Writ of Certiorari be granted to review, in part, the decision of the United States District Court for the District of Massachusetts granting Respondents', Jane Swift, *et al.*, Motion to Dismiss certain counts of Petitioner's complaint, and the affirmation of same by the United States Court of Appeals for the First Circuit.

Statement of the Case

This is an appeal from a dismissal of several counts brought against, *inter alios,* Argeo Paul Cellucci, Thomas F. Reilly, Jane Perlov, John J. O'Brien, East Boston District Court, Commonwealth of Massachusetts' (hereinafter, collectively, the "Defendant State Officials") alleging that the new Gun Control Act of 1998, St.1998, c. 180, that amended M.G.L. c. 140, §§ 129B and 131, is unconstitutional as the statute violates the Second, Fifth, and Fourteenth Amendments to the U.S. Constitution, and violates Articles I and XVII of the Massachusetts Constitution.

The District Court dismissed Counts 6, 7, 9, 11, 12, 16, 18, and 22 on the ground that the Second Amendment: "(1) is inapplicable to the states; and (2) does not create an individual right." The District Court also granted the Defendant State Officials' Motion to Dismiss Counts 11, 14, 15, 16, 17, 19, 22, and 25 on the ground that (1) the statute complies with Due Process because adequate post-deprivation remedies are available; and (2) gun licenses are neither property nor liberty interest. The District Court's Memorandum and Order of March 9, 2001 is

included in the Appendix hereto.

With the District Court's granting of Defendant State Officials' Motion to Dismiss all of the counts listed above, Costerus' 42 U.S.C. § 1983 claims seeking prospective injunctive relief against these defendants in Counts 24, 34, and 35 become moot. Conversely, had any of the above counts survived the motion, his § 1983 claims seeking prospective injunctive relief from the statute would remain justiciable.

The District Court judge ruled that *Presser v. Illinois,* 116 U.S. 252, 265 (1886), and *United States v. Miller,* 307 U.S. 174, 178 (1939) provides a well-settled interpretation of the Second Amendment. Petitioner Costerus seeks certiorari from this judgment.

The District Court also ruled that a gun license is neither a "property" nor "liberty" interest is implicated citing a state court decision in *Chief of Police of Shelburne v. Moyer,* 16 Mass.App.Ct. 543, 453 N.E.2d 461 (1983) and other cases which have a distinctly different statutory scheme than the one challenged by Petitioner Costerus under St. 1998, c. 180 that amended M.G.L. ch. 140, § 131. Under the new state gun law that requires a license to carry firearms in order to merely possess firearms in one's home, Plaintiff Costerus contends that such a statute creates a vested property right.

The property right necessarily exists because the statute amended the provisions that previously allowed the possession and ownership of firearms in one's home, whereas now, under the review new statutory scheme, a license to carry is required for such ownership. By this measure, the statute created a de facto property right as such ownership is preconditioned upon on a license to carry. Where firearm ownership is a constitutionally protected liberty, a liberty interest attached to the license

to carry when such ownership is predicated on the license. An application for a license to carry cannot be arbitrarily or capriciously denied nor can the issuance of a license be subject to the standardless discretion of the issuing authority.

Statement of Facts

In 1998, Massachusetts overhauled its gun control statutes by enacting St.1998, c. 180.

While relocating back to Massachusetts, on March 21, 1999, Costerus inquired about the new gun law at the Concord Police Station.

Erroneously believing that Costerus' previously issued FID card was no longer valid, Sgt. Barry Neal arrested Costerus for illegal possession of a firearm without a permit.

Without probable cause, Sgt. Neal dispatched Officer Timothy Landers to Costerus' home to search for, locate, and seize Costerus' firearms, all without seeking, obtaining, possessing, or having any knowledge of a search warrant.

Officer Landers searched Costerus' home and seized three firearms (one rifle and two handguns), and transported them to the Concord Police Station. Costerus was imprisoned overnight, arraigned in the Concord District Court, and posted $1,000 cash bail.

The Commonwealth's prosecution terminated in Costerus' favor as the Commonwealth sought a dismissal following Costerus' successful motion to suppress the illegally obtained, "fruit of the poisonous tree."

With all the criminal charges against Costerus having terminated in his favor, he then submitted an application for a license to carry firearms on or about

November 24, 1999. Wetherbee denied Costerus' application on December 31, 1999 on the basis of his recent involvement in firearms related activities in the Town of Concord.

Costerus then filed a petition for judicial review in the Concord District Court on January 3, 2000. The Concord District Court ruled on March 20, 2000 in Costerus' favor reversing Wetherbee's denial of Costerus' application for a license to carry firearms and ordered Wetherbee to issue such license.

On May 18, 2000, Wetherbee filed a complaint for certiorari in the Middlesex Superior Court.

On October 17, 2000, Costerus filed a civil action in the United States District Court for the District of Massachusetts asserting, *inter alia*, that the Commonwealth of Massachusetts and the Town of Concord, Massachusetts and its officers violated his rights under the state and federal constitutions.

On May 1, 2001, the Middlesex Superior Court issued its Memorandum of Decision and Order on [Wetherbee's] Motion for Judgment on the Pleadings in Defendant Wetherbee's favor, reversing the Concord District Court's ruling.

On May 4, 2001, Costerus filed a Notice of Appeal in the Middlesex Superior Court. This action is still pending in the Massachusetts Appeals Court. Costerus' two firearms remain in the custody of the Concord Police Department.

Reasons for Granting Writ of Certiorari

May it please the Court:

I. Second Amendment

For more than a century and a half, the Second Amendment received no meaningful judicial attention. For almost two centuries it received no scholarly attention. Even when the United States Supreme Court finally addressed the meaning of the amendment, in *United States v. Miller*, 307 U.S. 174 (1939), the Court rendered an opinion so opaque that inferior courts, practitioners and scholastics are still arguing about the holding of the case. Pro-gun advocates urge that the case clearly recognizes a personal, individual constitutional right to keep and bear arms. Anti-gun advocates, on the other hand, contend that it just as clearly holds the right to keep and bear arms to be only a collective right of the States in maintaining a militia. That it can be argued to stand for such diametrically opposed holdings suggests that it may not stand for very much at all:

> But when all is said and done, the only certainty about *Miller* is that it failed to give either side a clear-cut victory. Most modern scholars recognize this fact. For example Professor Eugene Volokh describes *Miller* as "deliciously and usefully ambiguous" in an article about using the Second Amendment as a teaching tool in constitutional law.

This is probably the most accurate statement that can be made about the case. This Court is, in essence,

writing on a clean slate.

In the past two decades the amendment has been the subject of intense historical and scholarly analysis. To assist the Court in its research of the burgeoning professional literature in this area and rather than restate what others have said better, Costerus attempts to list the most prominent scholars in the field, along with citations to their work.[1] Principal among these scholars are Professor Joyce Lee Malcolm, Dr. Stephen P. Halbrook, Professor Robert J. Cottrol, Mr. David T. Hardy, Professor Akhil Reed Amar, Professor Nelson Lund, Mr. David B. Kopel, Mr. Brannon P. Denning, and Mr. J. Norman Heath. The overwhelming conclusion of these analyses is that the amendment says what it means and means what it says.[2] What is most impressive about this near unanimous consensus of academic opinion is that many of the scholars are either self-identified "liberals" or unconnected with the pro-gun movement; indeed, in a tribute to intellectual honesty, a number of these authors identify themselves as favoring gun control. E.g., Professor Gary Kleck of the University of Florida, Professor William van Alstyne of Duke, Professor Laurence H. Tribe of Harvard University, Professor Sanford Levinson of the University of Texas, and Mr. Don B. Kates, Jr., of San Francisco.

The result of this vast scholarly effort is to demonstrate conclusively that the Framers of the Constitution understood and intended the right to keep

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[1] The scholarly work referred to herein is incorporated herein by reference, with a full bibliography of these works included in Appendix D.

[2] In the words of the bumper sticker debate which surrounds this controversial topic, one can now reasonably ask the anti-gun partisans, "What part of 'shall not be infringed' don't you understand?"

and bear arms to be a fundamental right of the individual citizen that had nothing to do with any "right" or power of the States.

Moreover, this Court seems to have forecast this result. From as early as 1857 to as recently as 1990, the Court has recognized in *dicta* that the right to keep and bear arms is a personal and individual right of free citizens. See *Scott v. Sandford*, 60 U.S. (19 Howard) 398, 417, 450 (1857), and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). See also the concurring opinion of Justice Thomas in *Printz v. United States*, 521 U.S. ___, 117 S.Ct. 2365 (1997) in which he equated the Second Amendment with the First Amendment, concluding that the Supreme Court has never directly ruled on the individual rights issue:

> In *Miller*, we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense." *Id.* at 2385-2386.

As Justice Scalia has noted, "It would be strange to find in the midst of a catalog of the rights of individuals a provision securing to the states the right to maintain a designated 'Militia.'" Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 3, 42-43 (Princeton Univ. Press, Princeton, N.J., 1997).

Coupled with this academic research into the Second Amendment's historical background is the law enforcement community's opinion thereon. In a recent letter to the National Rifle Association, U.S. Attorney General John Ashcroft expressed the opinion of the

Department of Justice:

> Let me state unequivocally my view that the text and original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms. . . . This view comports with all but unanimous understanding of the Founding Fathers.[3]

Recognizing the "vast body of evidence," he wrote, "I believe it is clear that the Constitution protects the private ownership of firearms for lawful purposes. In addition, Attorney General Ashcroft recently urged this Court to not grant certiorari in Emerson's petition for writ of certiorari. *Emerson v. United States*, Case No. 01-8780, June 10, 2002, *cert. denied.*

It is important to note that Attorney General Ashcroft's view is not novel. During the 19th Century, the official Supreme Court reports included summaries of counsels' arguments.

During the presidency of Andrew Jackson, Roger Taney served as Attorney General from 1831 to 1833, later becoming Chief Justice of the Supreme Court. As Taney's opinion in the famous *Scott v. Sandford*, 60 U.S. (19 Howard) 398 (1857) case made clear, Taney recognized the Second Amendment as an individual right.

Later, serving as Attorney General under Presidents Abraham Lincoln and Andrew Jackson, James Speed explained in *Ex parte Milligan*, 71 U.S. 2 (1866) to construe the Second, Third, Fourth, Fifth, and Sixth Amendments *in pari material*. The Second Amendment belonged to

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[3] Letter from U.S. Attorney General John Ashcroft to James J. Baker, Executive Director of the National Rifle Association, May 17, 2001.

individuals, but if a Confederate rebel were disarmed, his Second Amendment right would not be violated, since the Second Amendment would not apply to him - even though the Second Amendment carries no explicit exception for wartime.

During President Benjamin Harrison's administration, U.S. Attorney General William H. H. Miller defended the federal mailing ban by arguing that even though it was a restriction on a Bill of Rights' freedom, the Constitution allowed some restrictions: "Freedoms of the press, like freedom of speech, and 'the right to keep and bear arms,' admits of and requires regulation, which is the law of liberty that prevents these rights from running into license." *In re Rapier*, 143 U.S. 110, 131 (1892).

Two of President Franklin Delano Roosevelt's attorneys general, Homer Cummings and Robert Jackson, who was later appointed to the Supreme Court, held the same view. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

More recently, Edwin Meese, who served as Attorney General under President Reagan, now a scholar at the Heritage Foundation, signed the *amicus* brief of Academics for the Second Amendment, endorsing the individual-rights position in the Fifth Circuit's hearing of the appeal in *United States v. Emerson*, 99-10331, (5th Cir.). The federal district courts's case, *United States v. Emerson*, (5th Cir. 1999), challenged the constitutionality of a federal statute where Emerson was indicted for possession of a firearm while being under a restraining order. The Court ruled that a state court proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights, was unconstitutional. The court wrote:

> [B]y criminalizing protected Second Amendment activity based upon a civil state court order with no particularized findings, the statute is over-broad and in direct violation of an individual's Second Amendment rights. . . . [A]lthough he may not be a criminal at all, he is stripped of his right to bear arms as much as a convicted felon. Second Amendment rights should not be so easily abridged.

It is clear from this opinion that *Emerson's* Second Amendment rights are a citizen's individual rights.

The *Emerson* court also found that firearm possession is a valuable liberty interest imbedded in the Second Amendment and thus Emerson had a protected liberty interest in firearm possession under the Fifth Amendment's 'Due Process' clause. While the *Emerson* opinion is not binding upon other circuits, much less this Court, and while the plaintiff has appealed to the Court of Appeals for the Fifth Circuit, *Emerson* provides guiding precedent, yet underscores the diversity of this controversial debate. Even among the federal circuits, the Second Amendment's constitutional interpretation is not settled. And just weeks ago, this Court denied Emerson's petition for certiorari. *Emerson v. United States*, Case No. 01-8780, June 10, 2002, *cert. denied.*

We find that the current attorney general is in keeping with most of the attorneys general for the past 150 years and only out of step with his immediate predecessor but into some rather better company. With the combination of the academic and law enforcement communities' opinion on the Second Amendment, the remaining question then is whether M.G.L. c. 140, § 131

"infringes" upon this individual right. Because of the paucity of direct Second Amendment jurisprudence, there is no judicial precedent on the meaning of "shall not be infringed." Costerus disputes the District Court's ruling holding that *Presser v. Illinois*, 116 U.S. 252 (1886) and *United States v. Miller*, 307 U.S. 174 (1939), provide a well-settled interpretation of the Second Amendment.

If *Miller* was the only source of information about the Second Amendment, the individual right vs. government right argument might be impossible to resolve conclusively. Fortunately, the Supreme Court has addressed the Second Amendment in thirty-one other cases, in *dicta*; the Court has never addressed the Second Amendment as an individual rights issue directly nor has it considered whether Fourteenth Amendment protections apply to the Second Amendment. Accordingly, it is premature for the District Court in this action to rely on the *Presser* and *Miller* decisions to hold to that the issues involved in this action are "well-settled." The interpretation of the Second Amendment remains, therefore, *un*settled to this day, with the *dicta* contained in the written opinions of the Justices of the United States Supreme Court indicating that the Court regards the Second Amendment as an individual right. The line between *dicta* and *ratio decendi* is never firm, and one day's dicta may become another day's holding.

While the Warren and Burger Courts offered mixed records on the Second Amendment, the opinions from the Rehnquist Court are just as clear as the opinions from the Supreme Court Justices of the 19th Century: "the right of the people to keep and bear arms" is a right that belongs to individual American citizens. Although the boundaries of the Second Amendment have only partially been addressed by Supreme Court jurisprudence, the core

of the Second Amendment is clear: the Second Amendment - like the First, Third, Fourth, Fifth, Sixth, and Fourteenth Amendments - belongs to "the people," not the government.

Chief Justice William Rehnquist specifically cited the Second Amendment stating:

> "[T]he people" seems to have been the term of art employed in select parts of the Constitution. The preamble declares that the Constitution is ordained and established by "the people of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendment provided that certain rights and power are retained by and reserved to "the people." See also U.S. Const. Amdt. 1 ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble") (emphasis added); Art. 1, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the Several States") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the People" protected by the Fourth Amendment and by the First and Second Amendment, and to whom rights are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise

> developed sufficient connection with this country to be considered part of that community. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

The two Supreme Court decisions that the District Court's Memorandum cites as controlling are discussed *seriatim*.

A. *Presser v. Illinois*

Presser v. Illinois,116 U.S. 252 (1886), involved an Illinois statute which did not prohibit the possession of arms, but merely prohibited "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law . . . ." *Id.* at 264-265. Presser was indicted for parading a private military unit of 400 armed men through the streets of Chicago without a license.

1. Second Amendment Made Applicable to the States via Fourteenth Amendment

Presser held that "the right of the people to keep and bear arms shall not be infringed" is a limitation only upon the power of Congress and the national government, and not upon the States. But in view of the fact

> that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States . . . , the States . . . cannot prohibit the people from keeping and bearing arms, so as to deprive the United States of their

> rightful resource for maintaining the public security. *Id.* at 265.

The Court stated that the 5th and 6th sections of Article XI of the Military Code of Illinois[4] under consideration did not have the effect of depriving the national government of its military resource. The District Court's reliance upon such a narrow interpretation of *Presser* ignores subsequent judicial interpretations.

First, while the Supreme Court has never directly addressed the Second Amendment's application to the States by the Fourteenth Amendment, the Supreme Court has never ruled to the contrary either.

Justice Powell wrote for the plurality in *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976) quoting Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961):

> the full scope with the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints. *Id.* at 543 (Harlan, J., dissenting

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[4] Act of May 28, 1879, Laws of 1879, 192.

opinion).

In discussing the scope of the Fourteenth Amendment in *Planned Parenthood v. Casey*, 505 U.S. 833 (1982), in the Court's opinion written by Justice Sandra Day O'Connor approvingly quoted Justice Harlan's earlier statement that "the right to keep and bear arms" is part of the "full scope of liberty" contained in the Bill of Rights, and made applicable to the state by the Fourteenth Amendment. *Id.* at 841. These two cases illustrate how one day's *dicta* may become another day's holding.

More recently, the Court again visited the Fourteenth Amendment's protection of the right to keep and bear arms in *Albright v. Oliver*, 510 U.S. 266 (1994) when Justice Stevens, joined by Justice Blackmun, dissented, quoting Justice Harlan's analysis of the meaning of the Fourteenth Amendment providing that Fourteenth Amendment "liberty" of course belongs to individuals, not to state governments. The very point of the Fourteenth Amendment was to protect individual liberty from state infringement.

Clearly, by these barometers, the Second Amendment contained in the Constitution's Bill of Rights would seem dispositive on the question of whether the Fourteenth Amendment protects liberty and property interests. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits" *Board of Regents of State Colleges v. Roth*, 92 S.Ct. 2701, 408 U.S. 564, 33 L.Ed.2d 548 (1972), that "extend well beyond actual ownership of real estate, chattels, or

money."[5] Likewise, "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents of State Colleges v. Roth,* citing *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); and *Stanley v. Illinois,* 405 U.S. 645 (1972).

As discussed herein, the only plausible way that the District Court could hold that the Second Amendment, under *Presser,* is inapplicable to the States is to eschew subsequent and modern holdings of the Supreme Court. On this ground, the District Court erred and this Court should reverse the District Court's Order and the Court of Appeals affirmation thereof.

2. Second Amendment Secures an Individual's Right to Keep and Bear Arms

The *Presser* Court concluded that the Illinois statute did not infringe upon the Second Amendment since the statute did not prohibit the keeping and bearing of arms, but rather, prohibited the forming of private military organizations and the performance of military exercises in town by groups of armed men without a license to do so. The Court found that such prohibitions simply "do not infringe the right of the people to keep and bear arms." *Presser,* at 265.

The Supreme Court seemed to affirm the holding in *United States v. Cruikshank,* 92 U.S. 542 (1875) that the Second Amendment protected individuals only against action by the federal government. However, in the very

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[5] See, e.g., *Connell v. Higginbotham,* 403 U.S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418; *Bell v. Burson,* 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90; *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287.

next paragraph, the Court suggests that state governments cannot forbid individuals to keep and bear arms. Massachusetts law approaches this prohibition when it upholds arbitrary, capricious, and standardless discretion to its issuing authorities.

After stating that "all citizens capable of bearing arms" constitute the "militia," the Court held that the "States cannot . . . prohibit the people from keeping and bearing arms, as so to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government." *Presser*, at 265.

The District Court's reliance upon *Presser* to hold that the Second Amendment does not create an individual right may come from the Supreme Court's recognition of *United States v. Cruikshank* in which Chief Justice Marshall said that "the right of the people to keep and bear arms is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *Presser*, at 265 quoting *Cruikshank*, at 553.

Instead, according to *Cruikshank*, the individual's right to arms is not created by the Second Amendment, but merely protected by it, because the right derives from natural law. The government of the United States when established found it in existence, with the obligation to afford it protection. The District

Court erred by ignoring the individual's right to keep and bear arms, that is guaranteed by the Second Amendment, because that right preexisted the government to the United States and was recognized by the Framers and in the Supreme Court as a fundamental human right. The Supreme Court recognized that the

Constitution was powerless to create a preexisting,[6] fundamental human right, but nevertheless seized its obligation preserve it.

In concluding this discussion, the District Court is correct only insofar as the Second Amendment does not create an individual right to keep and bear arms as was held in *Cruikshank* and recognized in *Presser*, but, ignored the holdings of *Cruikshank* in which the Court held that such rights were protected by the Second Amendment by virtue of their preexistence. Accordingly, the District Court's reliance on *Presser* to hold that the Second Amendment right to keep and bear arms is not an individual's right is flawed and the District Court's granting of Respondent State Officials' Motion to Dismiss is in error. The decision should be reversed and the case remanded for further proceedings.

B. *United States v. Miller*

The Supreme Court's most extensive and hotly disputed Second Amendment decision, *United States v. Miller, et al.*, 307 U.S. 174 (1939) arose out of a 1938 prosecution of two bootleggers, Jack Miller and Frank Clayton, for violating the National Firearms Act by possessing a sawed-off shotgun without having paid the required federal tax. The federal District Court dismissed the indictment on the grounds that the National Firearms Act violated the Second Amendment. *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D.Ark. 1939).

The opinion, written by Justice James McReynolds, nowhere explicitly says that the Second Amendment

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[6] See *Logan v. United States*, 144 U.S. 263, 286-287 (1892); and *Robertson v. Baldwin*, 165 U.S. 275, 280 (1897).

does, or does not, guarantee an individual right:

> In the absence of any evidence tending to show the possession or use of a "shotgun having a barrel of less than 18 inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the second amendment guarantees the right to keep and bear such instrument. Certainly it is not within judicial notice at this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 2 Humphreys (Tenn.) 154, 158.

The *Miller* Court explained that "the militia comprised all males physically capable of acting in consort for the common defense . . . ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Miller*, at 179.

If the Second Amendment only protected the National Guard, then the Supreme Court would have thrown Jack Miller's case out of Court for lack of standing, since Miller was plainly not a member of the National Guard. Yet the Supreme Court has never ruled that individuals cannot raise Second Amendment claims. Instead, the Supreme Court sent the case back to the trial court for fact-finding about whether Miller's particular firearm (a sawed-off shotgun) was a militia-type weapon.

As the *Miller* case illustrates, individuals may raise Second Amendment claims, even when they are not in

the National Guard, and not participating in any type of militia activity. The only holding in *Miller* was that the only firearms that the Second Amendment protects are those that may be suitable for militia purposes.

The District Court ruling discusses, *arguendo*, that even if the Second Amendment conferred an individual right that was enforceable against a State, Costerus failed to demonstrate how Respondent State Officials' statutory scheme abridged that right. Costerus, however, appearing *pro se*, must only allege such an abridgement in his Complaint. Heretofore, Costerus is not obligated to present evidence in support of his claim as this would be an issue for fact-finding and trial, and is not ripe for a motion to dismiss at this stage of the proceedings.

The District Court opined that "[t]he [Respondent] Commonwealth's gun control statute allows law-abiding persons to possess firearms with certain restrictions intended solely to insure the safety of its citizens."[7] This is precisely the point at issue: Costerus is a law-abiding citizen devoid of any criminal convictions. He contends that the statute exceeds its reasoned balance by according standardless discretion to local licensing authorities from whom he is victim. Again, the District Court should find that this is a trial issue for fact-finding as alleged, and Costerus' Complaint need not do more.

Regarding standardless, systematic unequal treatment, the Supreme Court recently opined in the 2000 Presidential Election case that

> [T]he use of standardless manual recounts violates the Equal Protection

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[7] Memorandum and Order of the United States District Court for the District of Massachusetts, Civil Action 00-12156-MEL, March 9, 2001, p. 8.

> and Due Process Clauses" where "[t]he recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. . . . The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary." *Bush v. Gore*, 531 U.S. ____ (2000).

It would appear that *Bush v. Gore* would be dispositive of this case where the Respondent Commonwealth's granting of broad, yet standardless, discretion under M.G.L. c. 140, § 131(d) across its 351 cities and towns would suffer a similar fate as Florida's election count and recount, and would be violating the 'Equal Protection' and 'Due Process' Clauses.

The District Court's reliance upon *Miller* to hold that the Second Amendment does not create an individual right is misplaced; the *Miller* opinion nowhere explicitly says that the Second Amendment does or does not guarantee an individual right. In fact, *arguendo*, had the *Miller* Court ruled that the Second Amendment was a governmental right and not an individual right, then there would have been no reason for the Supreme Court to remand the case back to the District Court for fact-finding to determine whether the particular firearm in question was of a militia purpose. As a result, the only plausible interpretation of *Miller* is to conclude that the

Second Amendment supports an individual right to keep and bear arms.

II. Due Process

A. Adequacy of Post-Deprivation Remedy

1. Adequacy of Remedy Inadequate

Because the Concord Police were unable to obtain a conviction for illegal possession of firearms in a court of law (as Costerus held a valid FID card), the local licensing authority arbitrarily and capriciously exercised his broad discretion by relying on the fruit of the poisonous tree and a sealed record of a dismissal as grounds to deny Costerus of a license to carry. Costerus filed a petition for judicial review and obtained a favorable decision ordering the chief to issue a license to carry.

The chief filed an action in the nature of certiorari in the state superior court that made new findings of fact, reversed the district court's decision, and upheld the chief's denial of Costerus' application. Thus, Costerus remains without his valuable property for which he has always been properly permitted.

Costerus has had to file an appeal with the Massachusetts Court of Appeals to reverse the superior court decision and only recently filed his appellant's brief. Indeed, the remedy has not yet proved adequate, and given the court's backlog, is likely some time away.

While the District Court is correct insofar as there is a vehicle by which Costerus may seek to obtain post-deprivation remedy, and is currently availing himself of such remedy, such avenue has not yet proved adequate. In fact, thus far, with the superior court ruling

incongruent with all of the preceding state caselaw, only Costerus' sheer persistence in the state courts will he prove the remedy's adequacy. To date, however, the remedy has proved wholly *in*adequate.

2. Remedy for Post-Deprivation

With Costerus' possession of a valid FID card, there never should have been a deprivation in the very first place. The remedy therefor is two-fold. First, Costerus is must obtain a license to carry so he may regain his lawfully possessed property that the Concord police officers illegally seized and confiscated from his residence.[8] With the unconstitutional denial of Costerus' application therefor, this remedy is inadequate.

Second, by denying Costerus of a valuable governmental benefit, even if less than a constitutional right, Costerus is entitled to seek remedy under the federal and state civil rights statutes, 42 U.S.C. § 1983 and M.G.L. c. 12, § 11I, respectively, which is precisely the goal of his federal civil rights action.

The Massachusetts Supreme Judicial Court ruled in *Rzeznik v. Chief of Police of Southampton*, 374 Mass. 475, 373 N.E.2d 1128 (1978), that

> Although we are aware that the plaintiff, by statute, is not entitled to the licenses [to carry firearms and sell firearms and sell ammunition] . . . , we

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[8] It is important to note that the Gun Control Act set forth in St.1998, c. 180, § 73(a) caused Costerus' FID card to expire while the Concord Police Department had possession of his property. With this change in statute, Costerus had to apply for a license to carry firearms pursuant to M.G.L. c. 140, § 131(d) in order to regain his property.

> conclude on the basis of *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), that their revocation, if made in retaliation for the plaintiff's exercise of his First Amendment rights, is actionable under 42 U.S.C. section 1983 (1970).

In *Perry*, the Supreme Court wrote:

> For nearly a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his Constitutionally protected interests - especially, his interest in freedom of speech. *Id.* at 597, 92 S.Ct. 2697.

After *Perry*, it has been widely recognized that if an individual proves that a governmental benefit has been denied for constitutionally impermissible reasons, that individual is entitled to appropriate remedies under 42 U.S.C. section 1983 (1970). See *Mabey v. Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976); *Jannetta v. Cole*, 493 F.2d 1334, 1337 n. 5, 1338 (4th Cir. 1974); *Smith v. Losee*, 485 F.2d 334, 338, 340 (10th Cir. 1973). See also *Williams v. Day*, 412 F.Supp. 336, 340 n.1 (E.D.Ark.1976); *Manfredonia v. Barry*, 401 F.Supp. 762, 767-768 (E.D.N.Y.1975); *Needleman v. Bohlen*, 386 F.Supp. 741 (D.Mass.1974); *Brown v. Wilson*, 373 F.Supp. 1045, 1049 (W.D.Pa.1974); *O'Brien v. Galloway*,

362 F.Supp. 901, 905 (D.Del.1973). Cf. *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). It would appear that the Respondent State Officials' assertion and the District Court's holding therefor contradict binding precedent caselaw.

B. Gun Licenses as Property or Liberty Interests

The District Court relied, in part, on *Chief of Police of Shelburne v. Moyer*,16 Mass.App.Ct. 543, 453 N.E.2d 461 (1983) to support dismissal of Counts 11, 14, 15, 16, 17, 19, 22 and 25, because neither "property" nor a "liberty interest" is implicated by the denials of gun licenses. Such reliance is misplaced as the facts of *Moyer* are distinguishable from the instant action.

In *Moyer*, the Chief of Police of Shelburne Falls operated under a predecessor statute where (i) persons could possess a gun in the home with just a FID card; (ii) the local licensing authority had no discretion regarding the FID card if the applicant therefor was not statutorily disqualified; and, (iii) Moyer had disqualifying conditions[9] under the then-existing statute.[10]

Here, in Costerus' action, under the present gun law, (i) persons may not possess a handgun in the home with just a FID card – a license to carry is required;[11] (ii) the local licensing authority has broad discretion to issue a license to carry: "the local licensing authority may issue [the license] if it appears that the applicant is a suitable

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[9] Moyer's disqualifications included a sealed conviction of possession of a controlled substance pursuant to M.G.L. c. 94C, § 34.

[10] M.G.L. c. 140, § 131.

[11] M.G.L. c. 140, § 129B (6) as amended by St.1998, c. 180, § 29.

person to be issued such license . . . ;"[12] and, (iii) Costerus has no history of disqualifying criteria under either the preceding or current gun control laws.

Furthermore, because Costerus is not statutorily disqualified,[13] the Commonwealth cannot, under *Cruikshank*, arbitrarily forbid individuals to keep and bear arms. Whereas the Second Amendment protects Petitioner Costerus' fundamental right, he has a profound and legitimate claim of entitlement.

Under the guidelines established in *Moyer*, in which the court held that:

> In the absence of a finding that no reasonable ground existed for the Chief of police to refuse a license on the basis that the defendant was not a suitable person, the judge was in error in ordering the issuance of the license to the defendant

Costerus would be entitled to a license as the state district court[14] wherein Costerus petitioned for judicial review found that the chief of police was precisely without such basis as "there is no substantial evidence he is and unsuitable person . . . ."[15] Applying this holding to the instant matter where such absence is, itself, absent,

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[12] M.G.L. c. 140, § 131(d) as amended by St.1998, c. 180, § 41.

[13] The criteria that makes an applicant ineligible for a license to carry firearms are set forth in M.G.L. c. 140, § 131(d) (i) through (vii), as amended by St.1998, c. 180, § 41.

[14] The Concord District Court, Docket No. 0047-CV-0001.

[15] Findings of Fact and Conclusions of Law, Concord District Court, Docket No. 0047-CV-0001, dated March 20, 2000 (Ostrach, J.).

Moyer supports Costerus' contention and should not be relied upon in support of Respondent State Officials' motion to dismiss.

The federal district court in *United States v. Emerson*, (5th Cir. 1999) found that firearm possession is a valuable liberty interest imbedded in the Second Amendment and thus Emerson had a protected liberty interest in firearm possession under the Fifth Amendment due process clause.

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-570 (1972), the Supreme Court held that

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.

By establishing a statutory mechanism by which its citizens may lawfully own and possess firearms, a liberty interest was created and its dimensions defined by state law. By this measure, Costerus has a meritorious claim of entitlement to such state-created liberty interest and the benefits arising therefrom.

Having chosen to extend the right of its citizens to apply for, hold, and enjoy the privileges accorded to a Class A license to carry firearms, including the carrying of concealed firearms, the Respondent State Officials and local licensing authorities may not withdraw that right on grounds where fundamentally fair procedures to determine whether Costerus is statutorily barred, or, is based on a preponderance of legally admissible evidence

to establish his alleged unsuitability, and must therefore recognize his legitimate entitlement to such license as a property interest that is protected by the Due Process Clause, and that may not be taken away without observing some minimum procedures required by that Clause.

Since Concord Police Chief's allegations of Costerus' unsuitability, if sustained in the state appellate courts, could seriously damage his good reputation as well as interfere with his competitive aspirations, marksmanship training, and firearms safety instruction, the Respondent State Officials' statutory provisions that allow for the local police department's retention of his lawfully-possessed personal property that was illegally seized and confiscated from his home and the subsequent allowance of such illegally obtained evidence as ground to support the local licensing authority's denial of Costerus' application for a license to carry firearms immediately collide with the 'Due Process' Clause's prohibition against arbitrary deprivation of liberty.

Denial of an application for a license to carry is not de minimis and should not be imposed in complete disregard of the Due Process Clause, especially given that the allegations against him terminated in his favor.

Due Process requires, in connection with the denial of an application for a license to carry firearms, that the applicant be given oral or written notice of the basis for such denial and if the applicant desires to so refute those bases, be given an opportunity to present his version of the evidence. Generally, notice and hearing should precede the local licensing authority's denial of the application. The statute as set forth in M.G.L. c. 140, §§ 129B (5) (as amended by St.1998, c. 180, § 29) and 131 (f) (as amended by St.1998, c. 180, § 41) prescribes an after-

the-fact petition for judicial review.

Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). At a minimum, Costerus had a procedural due process right to a hearing prior to his suffering the deprivation of rights at the hands of the Concord Defendants' illegal confiscation of his lawfully held property.

Costerus' liberty interest is of concern to several hundred thousand licensed or permitted gun owners across the Commonwealth of Massachusetts who once lawfully kept handguns in their homes with a FID card, and who, as a result of the statutory change, may similarly have their liberty interests implicated, as well as several million others across eleven states that have discretionary statutes similar to Massachusetts'. Where the Second Amendment is made applicable to the States by the Fourteenth Amendment, which conveys liberty rights and protects his property via procedural due process, it was premature for the District Court to grant the Respondent State Officials' motion to dismiss noting that neither a property nor liberty interest was implicated. This is an issue for trial and is not ripe for such a motion. Accordingly, Counts 11, 14, 15, 16, 17, 19, 22, and 25 should be remanded to the District Court for further proceedings.

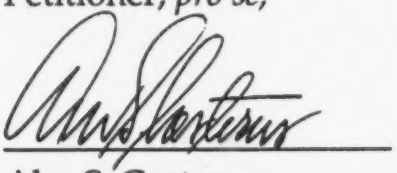
Conclusion

WHEREFORE, for all the foregoing reasons, Petitioner prays this Supreme Court grant Writ for Certiorari to find

(i) that the Second Amendment confers an individual right; (ii) that the Second Amendment is made applicable to the several States by the Fourteenth Amendment; (iii) that Massachusetts' statute, as currently worded, grants the exercise of broad, yet standardless, discretion to local licensing authorities, that violates the Due Process Clause of the Fifth Amendment; and, (iv) that the local licensing authority's ex post facto consideration of acts violates the 'Due Process' provisions of the Fourteenth Amendment; and in so finding on any of the above, to reverse the District Court's Order and the Court of Appeals' affirmation thereof as applied to Counts 6, 7, 9, 11, 12, 14, 15, 16, 17, 18, 19, 22, and 25 and to remand for further proceeding consistent with that directive.

Respectfully submitted on this 9th day of September, 2002, by,

Petitioner, *pro se*,



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Appendix A

Judgement, United States District Court for the District of Massachusetts, 00CV12156 MEL, Entered March 9, 2001 ..... A 2

Order, United States District Court, District of Massachusetts, 00CV12156 MEL, Entered July 7, 2001 ..... A 14

Judgment in a Civil Case, United States District Court, District of Massachusetts, 00CV12156 MEL, Entered August 8, 2001 ..... A 16

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALEC S. COSTERUS, Plaintiff,	)	
v.	)	Civil Action No. 00-12156-MEL
BARRY NEAL, et al., Defendants.	)	

MEMORANDUM AND ORDER

LASKER, D.J.

Alec Costerus brings this action *pro se* against the Commonwealth of Massachusetts, various employees of the Commonwealth (collectively, the "Commonwealth") two Massachusetts towns, Concord and Marion and assorted town employees alleging that they violated his state and federal "constitutional rights" to store and posses firearms. On December 1, 2000, the Commonwealth moved to dismiss the claims against it. The motion is granted.

On April 1, 1978, Costerus applied for and received a Firearms Identification Card ("FID-Card") from the police station in his then hometown of Marion, Massachusetts. The FID-Card allowed him to possess firearms. In the mid-1980s, Costerus moved out of Massachusetts. Under Massachusetts gun laws (M.G.L. Ch. 140, §§ 121-131P), Costerus was required to notify the

authority that had granted him his FID-Card of his move within thirty days. Costerus failed to notify the Marion Police Department. Subsequently, Costerus moved to Concord, Massachusetts, where he lives today.

In 1998, Massachusetts overhauled its gun laws, generally increasing the regulation of gun ownership. Under St.1998, Ch. 180, § 73, the plaintiff, as a holder of an FID-Card issued before the new law, had one year to comply with the new restrictions.

Costerus' Complaint centers around a purportedly illegal search, seizure and arrest by the Concord police which occurred on March 21, 1999. On that day, Costerus alleges the following: that he had a verbal fight with his wife; after the fight, he sought police assistance to gather "a few days worth of clothes;" the police instructed him to go to the police station and to wait while defendant, Officer Barry Neal, spoke to his wife; while at the station, Costerus saw a pamphlet concerning the new gun laws; Costerus then inquired about what he needed to do to comply with the new law; when Officer Neal returned from the Costerus' home (where Costerus' wife had told him that a non-physical fight had occurred), Officer Neal questioned Costerus about his gun ownership and whether he had a valid FID-Card; Costerus answered, "yes--but it was issued twenty years ago--however, I still think it is valid;" Officer Neal then responded "a lot has changed in twenty years" and arrested Costerus for unlawful possession of a firearm, presumably believing that he did not have a valid FID-Card; Officer Neal ordered another officer to search Costerus' home; the officer then searched and seized several guns from the home without consent or a warrant; while Costerus was being booked, the police required that he give them his social security number or else he would "never get out of

here;" and finally, that Costerus was then held overnight in police custody.

On March 22, 1999, Costerus was arraigned in Concord District Court and charged with two counts of illegal possession of a firearm (M.G.L. ch. 269, § 10(h)) and with domestic assault and battery (M.G.L. ch. 265, § 13A). Later, Costerus was charged with not properly securing weapons which were found in his home (M.G.L. ch. 140, § 131L(c)). All or the charges, except for not properly securing his firearms, were subsequently voluntarily dropped by the Commonwealth. This final charge was dropped because the state court had ruled that the Commonwealth's evidence was barred as the "fruit of a poisonous tree" because Officer Neal had failed to give Costerus Miranda warnings when he was arrested.

After the charges against Costerus had been dropped, he filed an application with the Concord Chief of Police, Leonard J. Wetherbee, for a "License to Carry," the license created under the new 1998 law that allowed the holder to own certain types of guns ("large capacity weapons"). Chief Wetherbee denied his request because of Costerus': (1) "failure to comply with a Concord Police Administrative Policy requiring the completion of a firearms safety course when applying for a License to Carry;" and (2) "his recent involvement in domestic and firearms related issues in the Town of Concord." Costerus then appealed the denial to the Massachusetts Superior Court, which reversed it as an abuse of discretion. Chief Wetherbee is currently appealing this decision. Costerus also applied to renew his FID-Card before the expiration of the one-year grace period. After a two- month investigation, which according to Costerus "illegally invaded into the plaintiff's privacy," Chief

Wetherbee granted the license.

Based on these events, Costerus, proceeding *pro se*, has filed a ninety-four page Complaint with over forty Counts mainly asserting that the Commonwealth, Concord and Marion defendants violated his rights to store and possess firearms under the Massachusetts and federal constitutions. The Commonwealth now moves to dismiss all of the Counts against it because: (1) Eleventh Amendment immunity bars some of Costerus' claims; (2) Costerus' Due Process and Second Amendment claims are not actionable; (3) The district attorney defendants, Martha Coakley and Erin Duggan are entitled to absolute prosecutorial immunity; and (4) Costerus' § 1983 claims are invalid because the Commonwealth and its officials are not "persons" subject to the statute.

II.

A. Eleventh Amendments Immunity

The Commonwealth argues that the Eleventh Amendment bars Counts 8, 9, 20, 24, 25, 30, 34 and 35 because these Counts attempt to hold the Commonwealth liable for violations of Massachusetts law in federal court. In support of its position the Commonwealth cites Pennhurst State Sch. and Hosp. v. Holderman, 465 U.S. 98, 121 (1984), in which the Supreme Court held that a suit in federal court against a state alleging violation of its own laws is barred by the Eleventh Amendment.

Costerus responds that Eleventh Amendment immunity does not apply because: (1) he is a citizen of Massachusetts and is suing Massachusetts; (2) he is requesting prospective injunctive relief; and (3) the

supplemental jurisdiction statute, 28 U.S.C. § 1367, overrides, or abrogates, the Eleventh Amendment.

The Commonwealth's motion is granted.[1] The reasons given by Costerus for rejecting Eleventh Amendment immunity are without merit. First, although the words of the Eleventh Amendment would appear to allow suits against a state by its own citizens, the Amendment has been consistently interpreted to bar such suits. Hans v. Louisiana, 134 U.S. 1 (1890).

Second, the fact that Costerus seeks to remedy purported violations of Massachusetts law through prospective injunctive relief is irrelevant to Eleventh Amendment analysis. As the Supreme Court explained in Pennhurst, 465 U.S. at 106: "a federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive . . . conflicts directly with the principles of federalism that underlie the Eleventh Amendment."

Third, Costerus' argument that Congress abrogated the States' Eleventh Amendment immunity in passing the supplemental jurisdiction statute (28 U.S.C. § 1367) is without merit. In order for Congress to have abrogated the States' Eleventh Amendment immunity through the passage of the supplemental jurisdiction statute, it would have had to have passed the statute both: (1) pursuant §

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[1] The Commonwealth has moved to dismiss counts 24, 25, and 34 based on the Pennhurst rule. Counts 25 and 34 make claims exclusively under federal law. Count 24 makes claims under both Massachusetts and federal law. The Commonwealth's Pennhurst argument has been understood as requesting only the dismissal of claims brought under Massachusetts law and accordingly, Counts 25, 34 (federal claims) and those portions of Count 24 which are based exclusively on federal law are not dismissed based on Pennhurst.

5 of the Fourteenth Amendment;[2] and (2) with an "unequivocal" intent to abrogate the States' Eleventh Amendment immunity.[3] Neither factor is even arguably present here. See Freeman v. Oakland Unified Sch. Dist., 179 F.3d 846.

B. Costerus' Second Amendment Claims

The Commonwealth moves to dismiss Counts 6, 7, 9, 11, 12, 16, 17, and 22 to the extent that they rely on the Second Amendment because the Amendment: (1) is inapplicable to the States; and (2) does not create an individual right. Presser v. Illinois, 116 U.S. 252, 265 (1886); United States v. Miller, 307 U.S. 174, 178 (1939).

Costerus responds that a passing reference made in Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 543 (1961), to the "right to bear arms" and quoted in two majority opinions not dealing with the Second Amendment,4 establishes such a right.

The Commonwealth's motion is granted. Presser and Miller control. Justice Harlan's reference in his dissent in Poe, to "the right to bear arms" does not purport to be an adjudication that such a right exists and the quotation of his dissent in later cases appears solely in a discussion of the nature of Due Process.[4]

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[2] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) and its progeny have held that claims of Congressional abrogation of Eleventh Amendment immunity could only be made under § 5 of the Fourteenth Amendment.

[3] Green v. Mansour, 474 U.S. 64, 68 (1985). (9th Cir. 1999) (holding that in enacting 28 U.S.C. § 1367 Congress did not abrogate the States' Eleventh Amendment immunity).

[4] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848 (1992); Moore v. City of East Cleveland, 431 U.S. 494, 502 (1976).

Moreover, even if the Second Amendment did confer an individual right (enforceable against a State), Costerus has not demonstrated how the Commonwealth's statutory scheme abridged the right. The Commonwealth's gun control statute allows law-abiding persons to possess firearms with certain restrictions intended solely to insure the safety of its citizens. Such a statute, which strikes a reasoned balance between the interests of gun owners and the interests of citizens to be free from the potential dangers of guns does not offend, even a quite expansive and personal conception, of the Second Amendment. Accordingly, Counts 6, 7, 9 and 16 are dismissed in their entirety and Counts 11, 12, 18, and 22 are dismissed to the extent that they make Second Amendment claims.

C. Costerus' Due Process Claims

In Counts 11, 14, 15, 16,17, 19, 22 and 25 Costerus asserts that the Commonwealth's gun statute violates Due Process because it grants the Chiefs of Police discretion to: (1) deny Costerus a "license to carry;" (2) refuse to renew his FID-Card; and (3) seize his guns. Moreover, Costerus argues that "because M.G.L. Ch. 140, § 131L is a new statute with no *mens rea* requirement, it violates [Costerus'] Fifth Amendment due process rights [because he can be] subject to prosecution without proof of knowledge that he was violating the statute." Complaint, ¶ 178.

The Commonwealth moves to dismiss. It argues that: (1) the statute complies with Due Process because adequate post-deprivation remedies are available; and (2) Costerus cannot assert Due Process claims based on denials of gun licenses because neither a "property" nor

"liberty" interest is implicated. The Commonwealth also denies that its gun statute imposes criminal liability for weapons storage without requiring *mens rea*, a guilty state of mind.

The Commonwealth's. motion is granted. Costerus' Due Process claims based on the Commonwealth's initial denial of a gun license fail because Massachusetts provides an adequate post-deprivation remedy. Under M.G.L. ch. 140, §, 129B, Costerus was entitled to and received judicial review of the initial gun license denial. The Supreme Court has held that the availability of post-deprivation judicial review is a particularly important factor in determining whether Due Process has been accorded; Zinermon v. Burch, 494 U.S. 113 (1990). Because judicial review was readily available to Costerus, his Due Process claims are not actionable.

Many of these claims also fail because neither a "property" nor a "liberty" interest is implicated by the Commonwealth's initial denial of a "License to Carry." Costerus did not have a "legitimate claim of entitlement" to a "License to Carry." Chief of Police of Shelburne v. Moyer, 16 Mass.App.Ct. 543, 547, 453 N.E.2d 461 (1983) (plaintiff did not have a liberty or property interest in a gun license); see Board of Regents v. Roth, 408 U.S. 564 (1972) (describing the stringent standard for making a federal Due Process claim based on an "entitlement"). An applicant seeking "License to Carry" has neither a "property" nor "liberty" interest, but is seeking a privilege, which can be extended (or refused) by the Commonwealth without Due Process implications.[5] See

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[5] Similarly, Count 21, Costerus' "impairment of contract" claim is based on his FID-Card which he alleges is a "contract" with the Commonwealth. This claim is dismissed. Under Massachusetts law, Costerus' FID-Card was

Medina v. Rudman, 545 F.2d 244, 250-51 (1st Cir. 1976) (holding that a potential greyhound license applicant under New Hampshire law had neither a liberty or property interest in her application); Luk v. Commonwealth, 421 Mass 415, 658 N.E.2d 664, 669 (1995) (holding that a driver's license is neither a contract nor property right); Town of Milton v. Commonwealth, 416 Mass. 471, 623 N.E.2d 482, 484 (1993) (holding that under Massachusetts law for a statute to create a contract there must be clear legislative intent to do so); and Mosby v. McAteer, No. 99-6504, 2001 WL 91407 (R.I. Super. Jan. 10, 2001) (holding that an applicant for a gun license under Rhode Island's parallel gun licensing statute did not have either a "liberty" or "property" interest in their application).

Nor does the Commonwealth's criminal firearms storage statute (M.G.L. 140, § 131L) violate Due Process. Contrary to Costerus' argument, the courts have held that violation of a parallel statute (M.G.L. ch. 269, § 10(a)) requires a guilty state of mind. Commonwealth v. Sampson, 383 Mass. 750, 422 N.E.2d 450, 456 (1981) and Commonwealth v. Jackson, 369 Mass. 904, 344 N.E.2d 166, 173 (1976), both held that a guilty state of mind is required in order to convict a person of the closely analogous crime of unlawful possession of a firearm and

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a license, not a contract, and cannot be the basis of an impairment of contract claim. See Luk, 658 N.E.2d at 669 (holding that a driver's license is not a contract right). Count 25, alleges that the Commonwealth conspired with local authorities to deny Costerus the "privilege" of gun ownership purportedly in violation of the Due Process Clause. This claim is without merit because even if officers of the Commonwealth had "conspired" to deprive him of gun ownership such a claim would not be actionable in federal court because the "conspiracy" did not deprive him of any federally protected right and adequate post-deprivation remedies exist.

there is no reason to believe that the Supreme Judicial Court would rule any differently with respect to the firearms storage statute then it did when presented with the firearms possession statute.

D. Costerus' Claims Against the District Attorney Defendants

In Counts 6, 8, 9, 11 and 33, Costerus asserts claims against District Attorney Martha Coakley and Assistant District Attorney Erin Duggan for their roles in prosecuting him for the events of March 21, 1999. The Commonwealth moves to dismiss on the grounds of prosecutorial immunity. The Commonwealth's motion is granted. Coakley and Duggan are entitled to absolute immunity from a suit for monetary damages for actions taken in their official capacity as advocates of the state. Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993). Count 33 is dismissed.[6]

E. Costerus' 42 U.S.C. § 1983 Claims Against the Commonwealth

In Counts 24, 34 and 35, Costerus seeks to hold the Commonwealth liable under 42 U.S.C. § 1983 for the actions of its officers undertaken sin their official capacities which purportedly violated federal law. The

[6] Counts 6, 8, 9 and 11 are already dismissed, as described above, by either the Eleventh Amendment or because they do not state a federal claim. Count 33 is dismissed against the District Attorney defendants because it asserts a claim exclusively for money damages which is contrary to Buckley's absolute immunity rule. Costerus claims that he may sue the district attorney defendants for prospective injunctive relief. Costerus is correct, however, as his Complaint is currently written, it does not do so.

Commonwealth moves to dismiss, arguing that neither it nor its officers are "persons" subject to § 1983, citing Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), in support of its position. The Commonwealth's motion is granted to the extent that it seeks to prevent Costerus from suing the Commonwealth or its officials for money damages. In Will, 491 U.S. at 70 n.10, the Supreme Court noted that while generally a state official is not a "person" subject to suit under § 1983, a state official is considered a "person" under § 1983 when she is sued in her official capacity for prospective injunctive relief. Thus, to the extent that Costerus seeks prospective injunctive relief under § 1983 against officials of the Commonwealth his claims are not barred by Will. However, this point is academic. These Counts still fail to state a claim because, as described above, Costerus has not alleged an actionable violation of federal law.

III.

From Costerus' ninety-four page Complaint and other filings it is clear that he is an intelligent and tenacious person who is understandably troubled by his interactions with the Concord Police Department over his possession of firearms. However, the fact that Costerus appears to have stated a claim against Concord does not give him an unfettered license to file a multiplicity of patently frivolous claims against either the Commonwealth or the Town of Marion. Fed.R.Civ.P. 11 prohibits such conduct even by a party appearing *pro se*. In the future, Costerus should exercise more care in separating his tenable legal arguments from those which are unsupportable. The Commonwealth's motion to dismiss is granted. Costerus' state law claims and his

federal claims which are barred exclusively by Zinermon are dismissed without prejudice. Costerus' other federal claims are dismissed with prejudice.

It is so ordered.

Dated: March 9, 2001 s/Morris E. Lasker
Boston, Massachusetts U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALEC S. COSTERUS, Plaintiff, v. GOVERNOR PAUL CELLUCCI, et al., Defendants.	)	No. 00-12156-MEL ORDER

LASKER, D.J.

Paul Cellucci, former Governor of the Commonwealth of Massachusetts, Attorney General Thomas Reilly, District Attorney Martha Coakley, Assistant District Attorney Erin Duggan, Secretary of the Executive Office of Public Safety Jane Perlov, Commissioner of Probation John J. O'Brien, the East Boston District Court, the Commonwealth of Massachusetts, the Town of Marion, Brian J. Scott and Jonathan Philbrook (collectively, the "Non-Concord Defendants" – the Town of Concord and its officers being the only remaining defendants) move for entry of final judgment under Fed.R.Civ.P. 54(b). Costerus has not filed an opposition. The request is granted because:

(1) Entry of a final judgment dismissing the action against the Non-Concord Defendants will dispose of all of the claims against them in this action;

(2) There is no just reason to delay the entry of final judgment. The dismissal of the Non-Concord Defendants is based on the plaintiff's failure to state a cognizable claim against them under Fed.R.Civ.P. 12(b)(6). The reasons supporting this court's determination are distinct from the factual and legal issues pertaining to the other defendants. An appeal of the Non-Concord Defendants dismissal would not require the consideration of any issue that might be raised even if plaintiff or the other defendants ultimately appeal a judgment in the pending claims. Further, resolution of the pending claims would not moot an appeal of the Non-Concord Defendants' dismissal because the issues are distinct. An adjudication of such an appeal would not delay or otherwise impede resolution of the remaining claims; and

(3) If an appeal of Non-Concord Defendants' dismissals is delayed until the end of the case and if such an appeal is successful, both plaintiff and the Non-Concord Defendants would be prejudiced because they would then be required to resume litigation, including discovery.

Therefore, it is hereby ordered that a judgment enter dismissing from this action the Non-Concord Defendants in their entirety, with each party bearing its his own the legal fees, costs, and expenses.

It is so ordered.

Dated: March 9, 2001 s/Morris E. Lasker
Boston, Massachusetts U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALEC S. COSTERUS,
Plaintiff(s)

v.

Civil Action
No. 00-12156-MEL

BRIAN J. SCOTT,
JONATHAN F. PHILBROOK,
ARGEO PAUL CELLUCCI,
THOMAS REILLY,
MARTHA COAKLEY,
ERIN DUGGAN,
JOHN J. O'BRIEN,
EAST BOSTON DISTRICT COURT,
TOWN OF MARION,
COMMONWEALTH OF MASSACHUSETTS
Defendant(s)

JUDGMENT IN A CIVIL CASE

LASKER, S.D.J.

☐ Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

In Accordance with the Court's Order of July 7, 2001; That judgment enter dismissing from this case the Non Concord defen[d]ants as follow[s]: Argeo Paul Cellucci, Thomas Reilly, Martha Coakley, Erin Duggan, John J. O'Brien, East Boston District Court, Jonathan F. Philbrook, Town of Marion and the Commonwealth of Massachusetts. With each party bearing his own legal fee, costs and expenses.

TONY ANASTAS,
CLERK OF COURT

Dated: 8/8/01

By: s/ George H. Howarth
Deputy Clerk

Appendix B

Judgement, United States Court of Appeals for the First Circuit, Case No. 01-1493,
Entered April 29, 2002

United States Court of Appeals
For the First Circuit

No. 01-1493

ALEC S. COSTERUS,

Plaintiff, Appellant,

v.

BARRY NEAL, ET AL.,

Defendants, Appellees.

Before

Lynch, Circuit Judge,
Campbell and Stahl, Senior Circuit Judges.

JUDGMENT

Entered: March 29, 2002

The judgment of the district court is affirmed essentially for the reasons stated in its Memorandum and Order of July 7, 2001. See also Thomas v. members of City Council of Portland, 730 F.3d 41, 42 (1st Cir. 1984) (per curiam). We do not reach appellant's argument, abandoned on

appeal, that the statutory definition of "large capacity weapon" is unconstitutionally vague. Cf. Gun Owners' Action League, Inc. v. Swift, __ F.3d __, 2002 WL 434188, at *10 (1st Cir. Mar. 25, 2002) (finding similar claim not ripe for review).

By the Court:

Richard Cushing Donovan,
Clerk

By: Janice M. O'Neil
Chief Deputy Clerk

Appendix C

Massachusetts General Laws, Chapter 140, § 131

M.G.L., c. 140, § 131, as amended by Chapter 180 of the Acts of 1998, "An Act Relative to Gun Control in the Commonwealth," approved on July 23, 1998, effective ninety (90) days thereafter on October 21, 1998, states:

Section 131. All licenses to carry firearms shall be designated Class A or Class B, and the issuance and possession of any such license shall be subject to the following conditions and restrictions:

(a) A Class A license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry: (i) firearms, including large capacity firearms, and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper; and (ii) rifles and shotguns, including large capacity weapons, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as it deems proper. A violation of a restriction imposed by the licensing authority under the provisions of this paragraph shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $1,000 nor more than $10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

The colonel of state police may, after an investigation, grant a Class A license to a club or facility with an on-site shooting range or gallery, which club is incorporated under the laws of the commonwealth for the possession, storage and use of large capacity weapons, ammunition therefor and large capacity feeding devices for use with such weapons on the premises of such club; provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license; and provided further, that such large capacity weapons and ammunition feeding devices may be used under such Class A club license only by such members that possess a valid firearm identification card issued under section 129B or a valid Class A or Class B license to carry firearms, or by such other persons that the club permits while under the direct supervision of a certified firearms safety instructor or club member who, in the case of a large capacity firearm, possesses a valid Class A license to carry firearms or, in the case of a large capacity rifle or shotgun, possesses a valid Class A or Class B license to carry firearms. Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties.

No large capacity weapon or large capacity feeding device shall be removed from the premises except for the purposes of: (i) transferring such firearm or feeding device to a licensed dealer; (ii) transporting such firearm or feeding device to a licensed gunsmith for repair; (iii) target, trap or skeet shooting on the premises of another club incorporated under the laws of the commonwealth and for transporting thereto; (iv) attending an exhibition

or educational project or event that is sponsored by, conducted under the supervision of or approved by a public law enforcement agency or a nationally or state recognized entity that promotes proficiency in or education about semiautomatic weapons and for transporting thereto and therefrom; (v) hunting in accordance with the provisions of chapter 131; or (vi) surrendering such firearm or feeding device under the provisions of section 129D. Any large capacity weapon or large capacity feeding device kept on the premises of a lawfully incorporated shooting club shall, when not in use, be secured in a locked container, and shall be unloaded during any lawful transport. The clerk or other corporate officer of such club shall annually file a report with the colonel of state police and the executive director of the criminal history systems board listing all large capacity weapons and large capacity feeding devices owned or possessed under such license. The colonel of state police or his designee, shall have the right to inspect all firearms owned or possessed by such club upon request during regular business hours and said colonel may revoke or suspend a club license for a violation of any provision of this chapter or chapter 269 relative to the ownership, use or possession of large capacity weapons or large capacity feeding devices.

(b) A Class B license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry: (i) non-large capacity firearms and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of such firearm as the licensing authority deems proper; provided, however, that a Class B license shall not entitle the holder thereof to carry or possess a loaded

firearm in a concealed manner in any public way or place; and provided further, that a Class B license shall not entitle the holder thereof to possess a large capacity firearm, except under a Class A club license issued under this section or under the direct supervision of a holder of a valid Class A license at an incorporated shooting club or licensed shooting range; and (ii) rifles and shotguns, including large capacity rifles and shotguns, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as he deems proper. A violation of a restriction provided under this paragraph, or a restriction imposed by the licensing authority under the provisions of this paragraph, shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $1,000 nor more than $10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

A Class B license shall not be a valid license for the purpose of complying with any provision under this chapter governing the purchase, sale, lease, rental or transfer of any weapon or ammunition feeding device if such weapon is a large capacity firearm or if such ammunition feeding device is a large capacity feeding device for use with a large capacity firearm, both as defined in section 121.

(c) Either a Class A or Class B license shall be valid for the purpose of owning, possessing, purchasing and transferring non-large capacity rifles and shotguns, and for purchasing and possessing chemical mace, pepper

spray or other similarly propelled liquid, gas or powder designed to temporarily incapacitate, consistent with the entitlements conferred by a firearm identification card issued under section 129B.

(d) Any person residing or having a place of business within the jurisdiction of the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to such licensing authority or the colonel of state police, an application for a Class A or Class B license to carry firearms, or renewal of the same, which such licensing authority or said colonel may issue if it appears that the applicant is a suitable person to be issued such license, and that the applicant has good reason to fear injury to his person or property, or for any other reason, including the carrying of firearms for use in sport or target practice only, subject to such restrictions expressed or authorized under this section, unless the applicant:

(i) has, in any state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (a) a felony; (b) a misdemeanor punishable by imprisonment for more than two years; (c) a violent crime as defined in section 121; (d) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed; or (e) a violation of any law regulating the use, possession or sale of controlled substances as defined in section 1 of chapter 94C;

(ii) has been confined to any hospital or institution for

mental illness, unless the applicant submits with his application an affidavit of a registered physician attesting that such physician is familiar with the applicant's mental illness and that in such physician's opinion the applicant is not disabled by such an illness in a manner that should prevent such applicant from possessing a firearm;

(iii) is or has been under treatment for or confinement for drug addiction or habitual drunkenness, unless such applicant is deemed to be cured of such condition by a licensed physician, and such applicant may make application for such license after the expiration of five years from the date of such confinement or treatment and upon presentment of an affidavit issued by such physician stating that such physician knows the applicant's history of treatment and that in such physician's opinion the applicant is deemed cured;

(iv) is at the time of the application less than 21 years of age;

(v) is an alien;

(vi) is currently subject to: (A) an order for suspension or surrender issued pursuant to section 3B or 3C of chapter 209A or a similar order issued by another jurisdiction; or (B) a permanent or temporary protection order issued pursuant to chapter 209A or a similar order issued by another jurisdiction; or

(vii) is currently the subject of an outstanding arrest warrant in any state or federal jurisdiction.

(e) Within seven days of the receipt of a completed

application for a license to carry or possess firearms, or renewal of same, the licensing authority shall forward one copy of the application and one copy of the applicant's fingerprints to the colonel of state police, who shall within 30 days advise the licensing authority, in writing, of any disqualifying criminal record of the applicant arising from within or without the commonwealth and whether there is reason to believe that the applicant is disqualified for any of the foregoing reasons from possessing a license to carry or possess firearms. In searching for any disqualifying history of the applicant, the colonel shall utilize, or cause to be utilized, files maintained by the department of probation and statewide and nationwide criminal justice, warrant and protection order information systems and files including, but not limited to, the National Instant Criminal Background Check System. The colonel shall inquire of the commissioner of the department of mental health relative to whether the applicant is disqualified from being so licensed. If the information available to the colonel does not indicate that the possession of a firearm or large capacity firearm by the applicant would be in violation of state or federal law, he shall certify such fact, in writing, to the licensing authority within said 30 day period.

The licensing authority may also make inquiries concerning the applicant to: (i) the executive director of the criminal history systems board relative to any disqualifying condition and records of purchases, sales, rentals, leases and transfers of weapons or ammunition concerning the applicant; (ii) the commissioner of probation relative to any record contained within the department of probation or the statewide domestic

violence record keeping system concerning the applicant; and (iii) the commissioner of the department of mental health relative to whether the applicant is a suitable person to possess firearms or is not a suitable person to possess firearms. The director or commissioner to whom the licensing authority makes such inquiry shall provide prompt and full cooperation for that purpose in any investigation of the applicant.

The licensing authority shall, within 40 days from the date of application, either approve the application and issue the license or deny the application and notify the applicant of the reason for such denial in writing; provided, however, that no such license shall be issued unless the colonel has certified, in writing, that the information available to him does not indicate that the possession of a firearm or large capacity firearm by the applicant would be in violation of state or federal law.

(f) A license issued under this section shall be revoked or suspended by the licensing authority, or his designee, upon the occurrence of any event that would have disqualified the holder from being issued such license or from having such license renewed. A license may be revoked or suspended by the licensing authority if it appears that the holder is no longer a suitable person to possess such license. Any revocation or suspension of a license shall be in writing and shall state the reasons therefor. Upon revocation or suspension, the licensing authority shall take possession of such license and the person whose license is so revoked or suspended shall take all actions required under the provisions of section 129D. No appeal or post-judgment motion shall operate to stay such revocation or suspension. Notices of

revocation and suspension shall be forwarded to the executive director of the criminal history systems board and the commissioner of probation and shall be included in the criminal justice information system. A revoked or suspended license may be reinstated only upon the termination of all disqualifying conditions, if any.

Any applicant or holder aggrieved by a denial, revocation or suspension of a license, unless a hearing has previously been held pursuant to chapter 209A, may, within either 90 days after receiving notice of such denial, revocation or suspension or within 90 days after the expiration of the time limit during which the licensing authority is required to respond to the applicant, file a petition to obtain judicial review in the district court having jurisdiction in the city or town wherein the applicant filed for, or was issued, such license. A justice of such court, after a hearing, may direct that a license be issued or reinstated to the petitioner if such justice finds that there was no reasonable ground for denying, suspending or revoking such license and that the petitioner is not prohibited by law from possessing same.

(g) A license shall be in a standard form provided by the executive director of the criminal history systems board and shall contain a license number which shall clearly indicate whether such number identifies a Class A or Class B license, the name, address, photograph, fingerprint, place and date of birth, height, weight, hair color, eye color and signature of the licensee. Such license shall be marked "License to Carry Firearms" and shall clearly indicate whether the license is Class A or Class B. The application for such license shall be made in a standard form provided by the executive director of the

criminal history systems board, which form shall require the applicant to affirmatively state under the pains and penalties of perjury that such applicant is not disqualified on any of the grounds enumerated above from being issued such license.

(h) Any person who knowingly files an application containing false information shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment for not less than six months nor more than two years in a house of correction, or by both such fine and imprisonment.

(i) A license to carry or possess firearms shall be valid, unless revoked or suspended, for a period of not more than four years from the date of issue and shall expire on the anniversary of the licensee's date of birth occurring not less than three years but not more than four years from the date of issue. Any renewal thereof shall expire on the anniversary of the licensee's date of birth occurring not less than three years but not more than four years from the effective date of such license. Any license issued to an applicant born on February 29 shall expire on March 1. The fee for such application shall be $25, which fee shall be payable to the licensing authority and shall not be prorated or refunded in case of revocation or denial; provided, however, that the licensing authority shall retain one-half of such fee and the remaining portion shall be deposited into the Firearms Record Keeping Fund established under section 2SS of chapter 29.

Any person over the age of 70 shall be exempt from the requirement of paying a renewal fee for a Class A or

Class B license to carry.

(j)(1) No license shall be required for the carrying or possession of a firearm known as a detonator and commonly used on vehicles as a signaling and marking device, when carried or possessed for such signaling or marking purposes.

(2) No license to carry shall be required for the possession of an unloaded large capacity rifle or shotgun or an unloaded feeding device therefor by a veteran's organization chartered by the Congress of the United States, chartered by the commonwealth or recognized as a nonprofit tax-exempt organization by the Internal Revenue Service, or by the members of any such organization when on official parade duty or during ceremonial occasions. For purposes of this subparagraph, an "unloaded large capacity rifle or shotgun" and an "unloaded feeding device therefor" shall include any large capacity rifle, shotgun or feeding device therefor loaded with a blank cartridge or blank cartridges, so-called, which contain no projectile within such blank or blanks or within the bore or chamber of such large capacity rifle or shotgun.

(k) Whoever knowingly issues a license in violation of this section shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment for not less than six months nor more than two years in a jail or house of correction, or by both such fine and imprisonment.

(l) The executive director of the criminal history systems board shall send by first class mail to the holder of each

such license to carry firearms, a notice of the expiration of such license not less than 90 days prior to such expiration and shall enclose therein a form for the renewal of such license. The taking of fingerprints shall not be required in issuing the renewal of a license if the renewal applicant's fingerprints are on file with the department of the state police. Any licensee shall notify, in writing, the licensing authority who issued said license, the chief of police into whose jurisdiction the licensee moves and the executive director of the criminal history systems board of any change of address. Such notification shall be made by certified mail within 30 days of its occurrence. Failure to so notify shall be cause for revocation or suspension of said license.

(m) Notwithstanding the provisions of section 10 of chapter 269, any person in possession of a firearm, rifle or shotgun whose license issued under this section is invalid for the sole reason that it has expired, but who shall not be disqualified from renewal upon application therefor under this section, shall be subject to a civil fine of not less than $500 nor more than $5,000 and the provisions of section 10 of chapter 269 shall not apply; provided, however, that the exemption from the provisions of said section 10 of said chapter 269 provided herein shall not apply if: (i) such license has been revoked or suspended, unless such revocation or suspension was caused by failure to give notice of a change of address as required under this section; (ii) revocation or suspension of such license is pending, unless such revocation or suspension was caused by failure to give notice of a change of address as required under this section; or (iii) an application for renewal of such license has been denied. Any law enforcement officer who discovers a person to

be in possession of a firearm, rifle or shotgun after such person's license has expired, has been revoked or suspended, solely for failure to give notice of a change of address, shall confiscate such firearm, rifle or shotgun and the expired or suspended license then in possession and such officer, shall forward such license to the licensing authority by whom it was issued as soon as practicable. Any confiscated weapon shall be returned to the owner upon the renewal or reinstatement of such expired or suspended license within one year of such confiscation or may be otherwise disposed of in accordance with the provisions of section 129D. The provisions of this paragraph shall not apply if such person has a valid license to carry firearms issued under section 131F.

(n) Upon issuance of a license to carry or possess firearms under this section, the licensing authority shall forward a copy of such approved application and license to the executive director of the criminal history systems board, who shall inform the licensing authority forthwith of the existence of any disqualifying condition discovered or occurring subsequent to the issuance of a license under this section.

(o) No person shall be issued a license to carry or possess a machine gun in the commonwealth, except that a licensing authority or the colonel of state police may issue a machine gun license to:

(i) a firearm instructor certified by the criminal justice training council for the sole purpose of firearm instruction to police personnel;

(ii) a bona fide collector of firearms upon application or upon application for renewal of such license.

(p) The executive director of the criminal history systems board shall promulgate regulations in accordance with chapter 30A to establish criteria for persons who shall be classified as bona fide collectors of firearms.

(q) Nothing in this section shall authorize the purchase, possession or transfer of any weapon, ammunition or feeding device that is, or in such manner that is, prohibited by state or federal law.

(r) The secretary of the executive office of public safety or his designee may promulgate regulations to carry out the purposes of this section.

Appendix D

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